JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 685

ALEX H. WASHBURN
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PARAGON PRINTING CO. LITTLE ROCK

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALEX H. WASHBURN, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above styled case on November 15, 1960.

OPINIONS BELOW

The opinion of the Tax Court of the United States (Appendix A, Pages a-1 through a-8, infra) was reported at 33 T.C. No. 112. The opinion of the Court of appeals, (Appendix B, Pages a-9 through a-17, infra) is reported at 283 Fed. (2) 839.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, Page a-19, infra) was entered on November 15, 1960. The jurisdiction of this Court is envoked under 28 U.S.C.A., Paragraph 1254(1), and Sec. 7482, Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether expenditures made by Petitioner for the purpose of obtaining signatures on a petition to refer a legislative act to a vote of the people are deductible as ordinary and necessary business expenses under the provisions of Sec. 162, Internal Revenue Code of 1954, or alternatively, as non-business expenses under the provisions of Sec. 212(1) or (2), Internal Revenue Code of 1954.

2. Whether a regulation forbidding deduction of expenditures for ". . . lobbying purposes, the promotion of or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising . . ." may properly be construed as barring deduction of the expenditures referred to in 1. above.

STATUTES, REGULATION, AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes, Sec. 162, Internal Revenue Code of 1954 and Sec. 212, Internal Revenue Code of 1954, directly involved are set forth in Appendix D, Page a-20, infra. The regulation involved, Sec. 39.23(o)-1(f) of Treasury Regulations 118 is set forth in Appendix D, infra. The State Constitutional and Statutory provisions incidentally involved are Amendment No. 7, Constitution of Arkan-

sas, and Statute Sec. 3-1303, Arkansas Statutes of 1947, and said provisions are set forth in Appendix E, Pages a-21 through a-22, infra.

STATEMENT OF THE CASE

Petitioner, during the year 1955, was the publisher and editor of a newspaper published in Hope, Arkansas (R.10). Said newspaper is owned by an Arkansas corporation, 50% of the stock of which is owned by Petitioner, who is its only salaried officer (R.17).

In 1955, the Arkansas State Legislature passed an Act which exempted livestock and poultry feeds from the then existing 2% sales tax (R.19).

During the same year, Petitioner paid a total of $6-024.96 for legal and other expenses incurred in securing the required number of signatures for the purpose of referring said Act to a vote of the people (R.10). Petitioner claimed the amount of said expenditures as a deduction on his individual income tax return for 1955, and the Respondent disallowed the deduction (R.10).

Petitioner incurred said expenditures because he felt that the exemption of feeds from the 2% sales tax would directly cause an increase in the sales tax rate in Arkansas, causing purchaser of products to go to the neighboring Texarkana, Texas, which had no sales tax, thus reducing business in Hope, Arkansas. And, the loss of business by merchants of Hope would reduce the income of the publishing company and the personal income of the Petitioner (R 19,20,21).

Petitioner filed a timely petition with the Tax Court of the United States, alleging that said expenditures were deductible either as an ordinary and necessary business

expense under Sec. 162, Internal Revenue Code of 1954, or as a non-business expense under Sec. 212, Internal Revenue Code of 1954 (R.2,16).

The Tax Court held that said expenditures were not deductible on either ground claimed by Petitioner. The decision of the Tax Court was entered March 15, 1960 (R.35).

From this decision the Petitioner duly prosecuted a petition for review, which was filed May 13, 1960 (R.36).

The Court below held that the expenditures were not deductible on the grounds: (a) that Sec. 39.23(o)-1 of Treasury Regulations 118, as interpreted by the Supreme Court in the *Cammarano case*, 358 U.S. 498, specifically forbids the allowance of said expenditures; and, (b) that Petitioner's reasons for making said expenditures were too remote to be classified as either his necessary or his ordinary business, or non-business expenses. (Appendix B, Page a-9).

REASONS FOR GRANTING THE WRIT

The two questions presented are important questions which should be settled by this Court. First, in deciding that Sec. 39.23 (o)-1 of Treasury Regulations 118 prohibits the deduction of the type of expenditures involved in this case, the Court below, we submit, misapplied and misconstrued the effect of *Cammarano* v. *United States*, 358 U.S. 498. The activity of Petitioner was specifically authorized by the Constitution of the State of Arkansas (Appendix E). Furthermore, the specific activity of securing signers of petitions for the purpose of submission of proposed measures to a vote of the people was authorized by the Legislature of the State of Arkansas, and the

amount allowed to be expended for such purposes was provided (Appendix E). The activity did not consist of advertising or an effort to influence the vote of the Legislature or of the people. The prohibition approved by this Court in the *Cammarano* case should be limited to that class of expenditure which is for "matters of publicity, including the making of arrangements for speeches, contacting the Press, in respect of editorial comments, and news items . . . all designed to influence the opinions of the general public." Petitioner has not attempted to deduct any item connected with publicity, advertising, or even his own travel in connection with his speeches or other activities. He has only claimed the right to deduct the cost of securing signatures on a petition, and the legal expenses incident thereto.

Second, when the Court below held that the purposes for the expenditures made by Petitioner were too remote to permit deduction as ordinary or necessary business or non-business expenses, we submit that the Court failed to correctly interpret prior decisions of this Court, specifically *Welch* v. *Helvering*, 290 U.S. 111. Petitioner incurred the expenses in issue because he firmly believed that the law in question would result in injury to the only substantial source of income which he had: i.e., the newspaper business. Where taxpayer reasonably believes that an expenditure will be helpful to his business, it is not necessary that his judgment be proved correct, and we submit that the lower Court incorrectly interpreted prior decisions of this Court in finding that the expenses were neither ordinary nor necessary.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari be granted.

W. S. Miller, Jr.

Attorney for Petitioner

1015 Boyle Building
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APPENDIX A

United States Court of Appeals

[fol. 55] (Findings of Fact and Opinion of The Tax Court of the United States.)

33 T. C. No. 112.

Tax Court of the United States.

Alex H. Washburn ..... *Petitioner*

v.

Commissioner of Internal Revenue ..... *Respondent*

Docket No. 75379. Filed March 11, 1960.

The petitioner, a newspaper publisher and editor, made certain payments in circulating a petition to refer an act of the state legislature exempting livestock and poultry feeds from sales tax, to a vote by the people of Arkansas.

Held, such payments are not deductible either as business expenses under section 162, Internal Revenue Code of 1954, or as nonbusiness expenses under section 212 (1) or (2), Internal Revenue Code of 1954.

William S. Miller, Jr., Esq., for the petitioner.

H. D. Rogers, Esq., for the respondent. (Seal)

[fol. 56] Bruce, Judge: This proceeding involves a deficiency in Federal income tax determined against the petitioner for the year 1955 in the amount of $2,015.78. The

sole issue is whether a $6,024.96 expenditure incurred in circulating a petition to refer an Act of the Arkansas State Legislature to a vote by the people of Arkansas is deductible under section 162 or section 212 (1) or (2) of the Internal Revenue Code of 1954.

Findings of Fact.

The stipulated facts are so found and are incorporated herein by this reference.

Alex H. Washburn (hereinafter referred to as petitioner), an individual resident at Hope, Arkansas, filed his individual income tax return for the year 1955 with the district director of internal revenue in Little Rock, Arkansas.

During the year 1955, petitioner was the publisher and editor of the Hope Star, a newspaper published at Hope, Arkansas. Said newspaper was owned by Star Publishing Company, an Arkansas corporation. Petitioner owned 50% of the capital stock of the Star Publishing Company, and was its only salaried officer.

In 1955 the Arkansas State Legislature passed an act which exempted livestock and poultry feeds from the then existing 2% state sales tax.

During the year 1955, petitioner paid the following amounts for expenses incurred in securing the required number of signatures for the purpose of referring to the people for a popular vote at the November 1955 gen- [fol. 57] eral election an Act of the Legislature of the State of Arkansas granting sales tax exemption on livestock and poultry feeds:

Direct canvassing expense	$3,266.42
Hotels — canvassing	223.10
Postage, printing, express	558.18
Telephone	444.35
Legal services	1,500.00
Expenses, reimbursed to attorneys	32.91
Total	$6,024.96

Petitioner claimed said total amount of $6,024.96 as a deduction on his individual income tax return for the year 1955 and respondent disallowed the deduction.

The purpose of the $6,024.96 expenditure made by petitioner in 1955 was to render null and void the legislative act passed in 1955 granting sales tax exemption to livestock and poultry feeds.

Petitioner felt that if the exemption of livestock and poultry feeds from the 2% sales tax should continue, an increase in the overall sales tax rate would ultimately result; that such an increase in sales tax in Arkansas would cause many purchasers to go to Texarkana, a neighboring town in Texas which had no sales tax, thus reducing business in Hope; that such loss of business by the merchants of Hope would cause a reduction particularly in the advertising income of the Star Publishing Company and so in the personal income of the petitioner. The sales tax rate in Arkansas was later increased to 3%.

The $6,024.96 expenditure incurred by petitioner in 1955 for the purpose of referring an Act of the State Legislature to a vote by the people of Arkansas was not ordinary and [fol. 58] necessary to the carrying on of petitioner's trade or business, or for the production or col-

lection of income or for the management, conservation, or maintenance of property held for the production of income.

Opinion.

Petitioner contends that the $6,024.96 expenditure which he incurred in circulating a petition to refer an act of the state legislature granting sales tax exemption on livestock and poultry feeds to a vote by the people of Arkansas was ordinary and necessary to the carrying on of his trade or business and therefore is deductible under section 162, Internal Revenue Code of 1954.* Alternatively, petitioner contends that said amount is deductible under section 212 (1) or (2)** as a nonbusiness expense ordinary and necessary for the production of income.

[fol. 59] Preliminary, respondent, on reply brief, argues that petitioner's contention that the expenditures involved are ordinary and necessary business expenses within the meaning of section 162 was not set out as an assignment of error in his petition or mentioned in his opening statement at the hearing, but was made for the first time in his opening brief. Accordingly, respondent argues, this issue may not be considered by this Court, citing Jean Conrad, 27 B. T. A. 741, and William Greenberg, 25 T. C. 534.

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* Sec. 162. Trade or Business Expenses.

(a) **In General.**—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

** Sec. 212. Expenses for Production of Income.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; * * *

The assignment of error set forth in the petition challenges respondent's determination in substantially the same language employed by respondent in his explanation of the adjustment accompanying the Notice of Deficiency, and, in our opinion, is sufficiently broad to encompass petitioner's contentions, particularly when considered in connection with the facts set forth in the petition. In any event, we do not deem it necessary to enter into any extended discussion of this technical question, in view of our conclusions adverse to petitioner's contentions on the merits.

The instant case clearly comes within the purview of *Cammarano* v. *United States*, 358 U. S. 498 (1959),* where it was held that amounts paid in furtherance of publicity programs designed to persuade voters to vote against initiative legislation are not deductible as ordinary and necessary business expenses under the predecessor of section 162 and under applicable regulations prohibiting as deductions "sums of money expended for lobbying purposes, the [fol. 60] promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising * * *," Treasury Regulations 111, sections 29.23 (o)-1 and 29.23(q)-1** even though the passage of such initiative legislation would have seriously affected taxpayers' businesses. We cannot accept petitioner's argument that *Cammarano* is limited to enumerated "matters of publicity * * * designed to influence the opinions of the general public." 358 U. S. 498, 504-505. The amounts paid by petitioner in securing signatures for the referendum petition are as much

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* Affirming in one opinion 246 F. 2d 751 (C. A. 9), and F. Strauss & Son, Inc., of Arkansas, 251 F. 2d 724 (C. A. 8).

** Similar, but more detailed, prohibitions as to deductibility by both individuals and corporations are consolidated in regulations applicable under the 1954 Code. See Reg. Sec. 1.162-15 (c), adopted Dec. 28, 1959.

expenses for "the promotion or defeat of legislation" as were the publicity expenses involved in *Cammarano*. No logical distinction can be drawn between an initiative and a referendum. In *Cammarano* the Supreme Court held that "initiatives are plainly 'legislation' within the meaning of these Regulations," and commented that other courts had found "these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation," citing, *inter alia*, Old Mission Portland Cement Co. v. *Commissioner*, 69 F. 2d 676, affd. on other issues, 293 U. S. 289. Accordingly, petitioner's deduction under section 162 must be denied.

Petitioner's alternative contention is that the foregoing $6,024.96 expenditure is deductible under section 212 (1) or (2) as an expense ordinary and necessary for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. The term "ordinary and necessary" [fol. 61] as it is used in section 212 means that expenses, in order to be deductible, must bear a reasonable and proximate relation to the production or collection of income, or for the management, conservation, or maintenance of proprety held for such purpose. Bingham's Trust v. Commissioner, 325 U. S. 365. Petitioner's principal and immediate purpose in supporting the referendum was to remove the exemption from sales tax of livestock and poultry feeds, which, if not removed, might result in an overall increase in the rate of the sales tax in Arkansas, which in turn might drive business away from Hope, Arkansas, to the town of Texarkana, Texas, where there was no sales tax, which decrease in business in Hope might adversely affect the advertising income of the publishing company and eventually the salary and dividend income of petitioner. The possible benefit to petitioner

that might have resulted from the passage of such legislation is too remote and uncertain to justify the deduction of the expenditures involved under section 212.

Furthermore, under the teaching of Bingham's Trust v. Commissioner, *supra*, section 212 provides a class of nonbusiness deductions coextensive with the business deductions allowed by section 162. The enactment of the predecessor of section 212 "merely enlarged the category of incomes with reference to which expenses were deductible. It did not enlarge the range of allowable deductions of 'business' expenses." McDonald v. Commissioner, 323 U. S. 57, 62. In view of the consistent disallowance as business expenses, by both court decisions and Treasury [fol. 62] Regulations, of amounts paid for "the promotion or defeat of legislation," deductibility under section 212 (1) or (2), as a nonbusiness expense, must likewise be denied.

Decision will be entered for the respondent.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,530

Alex H. Washburn, Petitioner,
v.
Commissioner of Internal Revenue, Respondent.

Petition for Review of Decision of the Tax Court of the United States.

[November 15, 1960.]

Before SANBORN, WOODBROUGH, and MATTHES, Circuit Judges.

WOODBROUGH, Circuit Judge.

During the year 1955 the taxpayer, petitioner herein, was employed by the Star Publishing Company, an Arkansas corporation, as its sole salaried officer and publisher and editor of its daily newspaper published at Hope, Arkansas, called the Hope Star. He also owned fifty per cent of the corporation's capital stock. In 1955 the Arkansas Legislature passed an Act which exempted live-

stock and poultry feeds from the then existing 2% sales tax. During the same year the taxpayer expended the following amounts in securing the required number of signatures for the purpose of referring said exempting act to the vote of the people in the State of Arkansas at the November, 1955, general election:

Direct canvassing expense	$3,266.43
Hotels — canvassing	223.10
Postage, printing, express	558.18
Telephone	444.35
Legal services	1,500.00
Expenses, reimbursed to attorneys	32.91
Total	$6,024.96

The taxpayer felt that if the exemption of livestock and poultry feeds from the 2% sales tax should continue, an increase in the general sales tax rate would be enacted and such an increase would cause many purchasers to go to Texarkana, a neighboring town in Texas which had no sales tax, thus reducing business in Hope, Arkansas; such loss of business by merchants in Hope would cause a reduction of the income of the Star Publishing Company, particularly in its advertising income and consequently in the personal income from publishing company dividends to the taxpayer.

The taxpayer claimed the total amount of $6,024.96 as a deduction on his individual income tax return for the year 1955, and the Commissioner disallowed the deduction, resulting in an income tax deficiency against petitioner for that year of $2,015.78. On the trial of the taxpayer's petition to the Tax Court he claimed the right to the deduction on the grounds that the expenditures were deductible either as ordinary and necessary expenses in carrying on any trade or business under Section 162(a)

of the Internal Revenue Code of 1954, 26 U.S.C. (1958 Ed.) Sec. 162, or as ordinary and necessary non-business expenses under Section 212(1) or (2) of the Code, 26 U.S.C. (1958 Ed.) Sec. 212.

The Tax Court found that the purpose of the $6,024.96 expenditure made by the taxpayer in 1955 was to render null and void the legislative Act passed in 1955 granting sales tax exemption to live stock and poultry feeds, and that since such expenditure was made for the promotion or defeat of legislation, it was not deductible as ordinary and necessary to the carrying on of taxpayer's trade or business, or for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. The Tax Court also held that the possible benefit to the petitioner that might have resulted to him personally from the legislation he sought to affect by his expenditure was too remote and uncertain to justify his claimed deduction. The findings of fact and opinion of the Tax Court denying the deduction are reported at 33 T.C. No. 112.

It is contended for petitioner on this review that his $6,024.96 expenditure in 1955 (1) "qualify as ordinary and necessary business expenses under Section 162" and alternatively (2) that they "qualify under Sections 212(1) or (2), I.R.C. 1954" and (3) that the Tax Court erred in denying the deduction on account of the Treasury Regulations. There is no dispute as to what the expenditures were or as to petitioner's purpose in making them. In order to connect them with the sections relied on, it is argued for petitioner that he regularly found it a necessary part of his duties as publisher of a small town newspaper to take positions and champion community causes and that he spent the money in question because he firmly believed that the law he sought to have annulled would re-

sult in injury to his source of livelihood. That as editor of a newspaper in promoting the welfare of his community and of the corporation employing him he was acting not simply for his own personal convenience, but was carrying out his ordinary duties towards the corporation. Also that he was acting under permissive provisions of Arkansas law which reserve the power to the people to approve or reject at the polls any entire act and forbid any person to expend more than $25,000.00 in securing signers of petitions for that purpose.

It is pointed out for the Commissioner, on the other hand, that the parts of the Internal Revenue Code of 1954 upon which the taxpayer relies, Section 162(a), supra, regarding ordinary and necessary business expenses, and Section 212(1) and (2), supra, regarding ordinary and necessary non-business expenses, are practically verbatim re-enactments of the corresponding provisions of the 1939 Code, Sections 23(a) (1) (A) and 23 (a) (2). During 1955, the tax year involved here, the Regulations under the corresponding sections of the 1939 Code were then applicable. T.D. 6091, 1954-2 Cum. Bull. 47. These included the following provision from Section 39.23 (o)-1(f) of Treasury Regulations 118:

> (f) Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

The corresponding Regulations adopted under the 1954 Code by T.D. 6291, 1958-1 Cum. Bull. 63, as amended by T.D. 6435, 1960-4 Int. Rev. Bull. 7, are included in Section 1.162-15 of Treasury Regulations on Income Tax (1954 Code).

In *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326, the Supreme Court had upheld the validity of this provision when it was part of Article 262 of Treasury Regulations 74. The Supreme Court said that it was applicable to prevent deduction under Section 23(a) of amounts spent for lobbying, even though the regulation was not specifically incorporated under Section 23(a). See also *American Hardware & Eq. Co.* v. *Commissioner*, 202 F.2d 126. It is fair to conclude, on the basis of the *Textile Mills* case, that this sentence, after its incorporation in Regulations 118 as Section 39.23 (o)-1(f), remained applicable under Section 23(a) of the 1939 Code, and that it became applicable, by reason of T.D. 6091, supra, to Sections 162(a) and 212(1) and (2) of the 1954 Code. At the time of the *Textile Mills* decision, Section 23(a) provided only for the deduction of ordinary and necessary business expenses. It did not provide for the deduction of ordinary and necessary non-business expenses. When provision for the latter was made in the Revenue Act of 1942, c. 619, 56 Stat. 798, Section 121, the old business expense provision became Section 23(a) (1) (A) and the new non-business expense provision became Section 23(a) (2). That Congress intended the regulation to remain applicable to Section 23(a) (1) (A) of the 1939 Code, and to Section 212(1) and section, is shown by the following excerpt from S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88 (1942-2 Cum. Bull. 504,571), and H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75 (1942-2 Cum. Bull. 372, 430), concerning Section 23(a) (2):

> A deduction under this section is subject, except for the requirement of being incurred in connection with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under Section 23(a) (1) (A) of an expense paid or incurred in carrying on any trade or business.

The regulation was therefore clearly applicable both to Section 162(a) of the 1954 Code, the successor to Section 23(a) (1) (A) of the Code, and to Section 212(1) and (2) of the 1954 Code, the successor to Section 23(a) (2) of the 1939 Code, pending adoption of Regulations under the 1954 Code.

The taxpayer does not disagree with this analysis, but has assumed that the regulation was in effect, while arguing that it is not applicable to the particular facts of this case. The Commissioner submits that the regulation is applicable to these facts; that the taxpayer is not entitled to the claimed deduction because his expenditures were for "the promotion or defeat of legislation"; and that the Tax Court's decision should be affirmed, not only because it is based on findings of fact which are not clearly erroneous (see *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *Revere Racing Ass'n* v. *Scanlon*, 232 F.2d 816), but also because no other result would be possible under the applicable decisions. *Cammarano* v. *United States*, 358 U.S. 498; *Roberts Dairy Co.* v. *Commissioner*, (8 Cir.) 195 F.2d 948; *Old Mission Portland Cement Co.* v. *Commissioner*, (9 Cir.,) 69 F.2d 676, affirmed on other issues, 293 U.S. 289.

Cammarano consisted of two cases (one of which arose from this Court under the name *F. Strauss & Son, Inc. of Ark.* v. *Commissioner*, 251 F.2d 724) in which the taxpayers were wholesale liquor dealers. In one case, the taxpayers were partners who contributed to a trust fund which was engaging in a publicity program to defeat an initiative measure that would have placed all retail beer and wine sales exclusively in the hands of the state. In the *Strauss* case, the corporate taxpayer contributed to an organization which was engaged in a publicity program to defeat an initiative measure providing for statewide prohibition. The taxpayers sought to deduct these contribu-

tions as ordinary and necessary business expenses under Section 23 (a) (1) (A) of the 1939 Code. Upholding the validity of the immediate predecessor of Section 39.23 (o)-1 of Treasury Regulations 118, the Supreme Court specifically rejected the taxpayer's contention (p. 504):

> that the regulations cannot properly be construed as applicable to expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies, that is "lobbying";

The Court said (p. 505):

> We think that the Regulations must be construed to mean what they say—that not only lobbying expenses, but also sums spent for "the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising" are nondeductible.

The Court also rejected the taxpayer's argument that initiative measures were not "legislation," noting that the measures if passed by the people would have had the effect and status of ordinary laws in every respect under provisions of the respective state constitutions. One of these constitutional provisions was Amendment 7 of the Arkansas Constitution, also involved in the instant case and cited by the taxpayer. Noting that these constitutional provisions explicitly intended to vest legislative power in the people, the Court said (p. 506):

> Every court which has considered the question has found these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation.

The facts in the instant case come within the purview of Strauss and Cammorano. Here the taxpayer expended money for the purpose of obtaining sufficient signatures

to make possible the referendum of an existing state statute to the people under the same state constitutional provision involved in Strauss. A referendum is clearly a legislative measure under the Supreme Court's decision, and therefore the expenditures made by the instant taxpayer to promote the referendum in this case are no more deductible than the expenditures in Strauss and Cammarano made to defeat an initiative measure. The taxpayer here argues that he expended these funds only for the purpose of securing signatures to make possible the referendum, and not for the promotion or defeat of legislation. But obviously he was doing it for the purpose of annulling the existing legislation. Having found this purpose as a fact, the Tax Court necessarily held the expenditures non-deductible under the specific provisions of the Treasury Regulations.

As to the finding and conclusion of the Tax Court that the possible benefit to the petitioner that might have resulted from the legislation for which he made the expenditures was too remote and uncertain to justify the claimed deduction, it is pointed out that he was only an officer and stockholder of the Star Publishing Corporation which was a separate taxable entity having a "trade or business" in respect to which it had its own tax obligations and deductions and which was not identical with his business of being an editor. There was no proof that this taxpayer was required by the Star Publishing Corporation to make the expenditures; he appears to have made them entirely of his own violition and they have no "reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income." The case of *Schmidlapp* v. *Commissioner*, 96 F.2d 680 is cited for the petitioner. There, the taxpayer, Vice President of a bank, spent $590.75 to en-

tertain bank customers, the item being shown as "Recess Club Charges", which were held to be deductible "so far as they really were to drum up business for the bank," "though it was proper to be extremely suspicious as to how far that was their purpose." But "drumming up customers" is ordinary business for a bank.

The circumstances under which the expenditures here in issue were made by the taxpayer fully support the finding of the Tax Court that they were neither necessary nor ordinary in carrying on the petitioner's business as editor of the newspaper, nor as a holder of capital stock in the corporation, and that the objects of his expenditures to obtain a popular vote to annul the exemptions in the sales tax statute because he thought the legislature would otherwise enact a higher sales tax statute which would result in diverting business from the town of Hope and ultimately result in less advertising for the paper and in the end less dividends for the petitioner—were too remote to be classified as either his necessary or his ordinary business or non-business expenses.

Finding no error, the decision of the Tax Court is

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,530

Alex H. Washburn, Petitioner, v. Commissioner of Internal Revenue, Respondent.	Petition for Review of Decision of the Tax Court of the United States.

Petition for Review of Decision of The Tax Court of the United States.

This cause came on to be heard on the petition to review the decision of The Tax Court of the United States entered March 15, 1960, determining that there is a deficiency in the income tax of the petitioner for the taxable year 1955, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of The Tax Court in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the petition for review in this cause be, and it is hereby, dismissed.

November 15, 1960.

APPENDIX D

The pertinent portions of the Federal Statutes involved are as follows:

Internal Revenue Code of 1954:

Sec. 162 Trade or Business Expenses.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .

(26 U.S.C., Sec. 162) 1958 Ed.

Sec. 212. Expenses for Production of Income.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; . . .

(26 U.S.C., Sec. 212) 1958 Ed.

The pertinent portion of the Regulations is as follows:

Section 39.23(o)-1(f) of Treasury Regulations 118:

"(f) Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income."

APPENDIX E

The pertinent portion of the Ark. Constitution, Amendment No. 7, is as follows:

"Sec. 1. Legislative power.—The legislative power of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill.

. . . .

Referendum—The second power reserved by the people is the referendum, and any number not less than six per cent of the legal voters may, by petition, order the referendum against any general act, or any item of an appropriation bill, or measure passed by the General Assembly, but the filing of a referendum petition against one or more items, sections or parts of any such act or measure shall not delay the remainder from becoming operative. Such petition shall be filed with the Secretary of State not later than ninety days after the final adjournment of the session at which such act was passed, except when a recess or adjournment shall be taken temporarily for a longer period than ninety days, in which case such petition shall be filed not later than ninety days after such recess or temporary adjournment. Any measure referred to the people by referendum petition shall remain in abeyance until such vote is taken. The total number of votes cast for the office of Governor in the last preceding general election shall be

the basis upon which the number of signatures of legal voters upon State-wide initiative and referendum petitions shall be computed.

Upon all initiative or referendum petitions provided for in any of the sections of this article, it shall be necessary to file, from at least fifteen of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county."

The pertinent portion of the Ark. Statute is:

"No person, persons, corporation or corporations, either individually or collectively, it or their agents or representatives shall expend, cause, or permit to be expended more than twenty-five thousand dollars ($25,000.00) in securing signers of petitions and the submission of any proposed measure, act, law or amendment to the Constitution to a vote of the people by initiation or referendum at any general election, . . ." *Sec.*, 3-1303, *Ark. Stat.* 1947.

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No. 686

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALEX H. WASHBURN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The findings of fact and opinion of the Tax Court (Pet. a-1—a-7) are reported at 33 T.C. 1003. The opinion of the Court of Appeals (Pet. a-9—a-17) is reported at 283 F. 2d 839.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1960. (Pet. a-19.) The petition for a writ of certiorari was filed on January 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether expenditures made by the taxpayer in securing signatures for the purpose of referring an

Act of the Arkansas legislature to popular vote were deductible either as ordinary and necessary expenses in carrying on any trade or business under Section 162(a) of the Internal Revenue Code of 1954 or as ordinary and necessary nonbusiness expenses under Section 212 (1) and (2) of the Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra,* pp. 8–10.

STATEMENT

During the year 1955, the taxpayer was the publisher and editor of the Hope Star, a newspaper published at Hope, Arkansas, and owned by Star Publishing Company, an Arkansas corporation. The taxpayer owned 50% of the capital stock of the Star Publishing Company, and was its only salaried officer. (Pet. a–2.)

In 1955, the Arkansas Legislature passed an Act which exempted livestock and poultry feeds from the then existing 2% state sales tax. During the same year, the taxpayer expended the following amounts in securing the required number of signatures for the purpose of referring this exemption Act to the people for a popular vote at the November 1955 general election (Pet. a–2—a–3):

Direct canvassing expense	$3,266.42
Hotels—canvassing	223.10
Postage, printing, express	558.18
Telephone	444.35
Legal services	1,500.00
Expenses reimbursed to attorneys	32.91
	$6,024.96

The taxpayer felt that, if the exemption of livestock and poultry feeds from the 2% sales tax should continue, an increase in the general sales tax rate would ultimately result; that such an increase in sales tax in Arkansas would cause many purchasers to go to Texarkana, a neighboring town in Texas which had no sales tax, thus reducing business in Hope; that such loss of business by the merchants of Hope would cause a reduction in the advertising income of the Star Publishing Company and so in the personal income of the taxpayer. The sales tax rate in Arkansas was later increased to 3%. (Pet. a–3.)

The taxpayer claimed the total amount of $6,024.96 as a deduction on his individual income tax return for the year 1955. The Commissioner disallowed the deduction. (Pet. a–3.)

The Tax Court found that the purpose of the $6,024.96 expenditure made by the taxpayer in 1955 was to render null and void the legislative Act, passed in 1955, granting sales tax exemption to livestock and poultry feeds, and that, since such expenditure was made for the promotion or defeat of legislation, it was not deductible as ordinary and necessary to the carrying on of the taxpayer's trade or business, or for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. (Pet. a–3—a–4.) The Tax Court also held that the possible benefit to the taxpayer that might have resulted from the defeat of such legislation was too remote and uncertain to justify the deduction. (Pet. a–6—a–7.)

The Court of Appeals affirmed the decision of the Tax Court. (Pet. a–9—a–17.)

ARGUMENT

The decision below represents a direct application of the principles enunciated by this Court in *Cammarano* v. *United States*, 358 U.S. 498, and *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326; there is no conflict in the circuits; and there is no other basis for review by this Court.

1. On the authority of *Cammarano* v. *United States, supra*, in which this Court held that amounts spent for the promotion or defeat of legislation, including initiatives and referenda, are not deductible as "ordinary and necessary" business expenses, the Tax Court correctly disallowed the claimed deduction in the present case under both Sections 162 and 212 of the Internal Revenue Code of 1954, Appendix, *infra*, p. 8. The pertinent regulation in force in 1955 (Treasury Regulations 118, Section 39.23(o)–1(f), Appendix, *infra*, p. 9), which prohibited "[s]ums of money expended for * * * the promotion or defeat of legislation * * *" to be "deductible from gross income * * *," similarly substantiated the Tax Court's position.[1]

In an attempt to avoid the holding in *Cammarano* and the express language of the pertinent regulation,

[1] The regulation was applicable to both Sections 162 and 212, pending adoption of the Regulations under the 1954 Code. (See Pet. a–13—a–14.) Section 1.162–15(c)(1) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*, pp. 9–10, which contained similar, but more detailed, prohibitions as to deductibility, was subsequently adopted. (See Pet. a–5, fn. **.)

the taxpayer argues (Pet. 4–5) that, in making expenditures to obtain the necessary number of signatures to have the Act placed on the ballot for referendum, he was not taking a position on the merits of the Act, and that therefore the amounts were not spent for the promotion or defeat of legislation but only to secure signatures on a petition. Even if this attempted distinction had any validity whatever in theory, it would merely raise a simple issue of fact concerning the taxpayer's purpose, as to which the Tax Court's findings would not be clearly erroneous. Cf. *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C.A. 1st). Moreover, in the absence of a referendum, the statute exempting livestock and poultry feed from the sales tax would have remained on the books. Therefore, as the Court of Appeals said (Pet. a–16), and the Tax Court found (Pet. a–3), the taxpayer obviously was expending these funds for the purpose of annulling the existing legislation.

The fact that the taxpayer was acting under the referendum authority of Amendment 7 to the Arkansas Constitution has no bearing on the deductibility of the expenditures. In *F. Strauss & Son, Inc.* v. *Commissioner*, 251 F. 2d 724 (C.A. 8th), affirmed *sub nom. Cammarano* v. *United States*, *supra*, in which the expenditures had been made to oppose an initiative originated under the same provision of the Arkansas Constitution, this Court refused to draw a distinction between initiatives or referenda and other types of legislation.

2. As an alternative ground for disallowance of the deductions under Sections 212 (1) and (2) of the 1954 Code, both courts below found that the benefit to the taxpayer to be realized from the defeat of the legislation was too remote and uncertain. In order that expenses be deductible under Section 212, they "must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income" (Treasury Regulations 118, Section 39.23(a)-15(c), Appendix, *infra*, pp. 8-9),[2] and, as this Court pointed out in *Trust of Bingham* v. *Commissioner*, 325 U.S. 365, 370, "questions of reasonableness and proximity are for the trier of fact, here the Tax Court."[3] In the present case, as the courts below correctly noted (Pet. a-6—a-7, a-17), the expenditures made by the taxpayer to annul the sales tax exemptions—in order to avoid the enactment of a higher sales tax which might divert business from the town of Hope and thus possibly result in less revenue for his newspaper and conceivably in less dividends to the taxpayer—were obviously too remote and uncertain from the intended

[2] Section 1.212-1(d) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*, p. 10, which was issued subsequent to the taxable year here involved (see footnote 1, *supra*), contains the same language as the 1939 regulation.

[3] A comparable rule of law would apply to expenses which must be "directly connected with or pertaining to the taxpayer's trade or business" (Treasury Regulations 118, Section 39.23(a)-1, Appendix, *infra*, p. 8; Treasury Regulations on Income Tax (1954 Code) Section 1.162-1(a), Appendix, *infra*, p. 9), if they are to be deductible as "ordinary and necessary" business expenses under Section 162 of the 1954 Code.

benefit to be allowable under Section 212 of the 1954 Code.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1961.

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*Petitioner's reliance (Pet. 5) on *Welch* v. *Helvering*, 290 U.S. 111, is misplaced, for there this Court affirmed a Tax Court holding that the taxpayer failed to carry his burden of proving his expenditures to be ordinary and necessary business expenses rather than capital outlays. There was no question of proximate relationship between the expenditures and the objective to be gained, as there was in the present case.

APPENDIX.

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

* * * * * *

(26 U.S.C. 162.)

SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax.

(26 U.S.C. 212.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.23(a)-1 *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. * * *

* * * * * *

Sec. 39.23(a)-15 *Nontrade or nonbusiness expenses.* * * *

* * * * * *

(c) Expenses, to be deductible under section 23(a)(2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

* * * * *

SEC. 39.23(o)-1 *Contributions or gifts by individuals.* * * *

* * * * *

(f) Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * *

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.162-1 *Business Expenses.*—(a) *In general.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162 * * *.

* * * * *

SEC. 1.162-15 [As amended by T.D. 6435, 1960-4 Int. Rev. Bull. 7] *Excepted Contributions.*—* * *

* * * * *

(c)(1) Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the

foregoing purposes are not deductible from gross income. * * *

* * * * * *

SEC. 1.212–1 *Nontrade or Nonbusiness Expenses.*— * * *

* * * * * *

(d) Expenses, to be deductible under section 212, must be "ordinary and necessary". Thus, such expenses must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

* * * * * *

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